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No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ONONDAGA COUNTY RESOURCE RECOVERY AGENCY, THE DUTCHESS COUNTY RESOURCE RECOVERY AGENCY, THE COUNTY OF DUTCHESS, AND THE NEW YORK STATE ASSOCIATION FOR SOLID WASTE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the prohibition against "hoard[ing] solid waste" recognized in *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 392 (1994), is inapplicable when the "preferred processing facility" is operated as part of a public waste management system.

2. Whether, even if viewed as non-discriminatory, the flow-control ordinances at issue here violate the Commerce Clause under the test articulated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

This case presents an attempt by the petitioners to expand the sweep of the dormant Commerce Clause far beyond the boundaries recognized in this Court's precedents and at the expense of traditional police powers. The waste-management ordinances challenged here are community regulations, enacted pursuant to the police power, that benefit only a public entity that is itself acting pursuant to that police power. To condemn such a law as "discriminatory" under the dormant Commerce Clause would enlarge that doctrine in ways that defy this Court's established police power jurisprudence and impair the constitutional balance between national and local authority.

Indeed, the tightly focused ordinances at issue here—in which a community regulates the handling of local waste in the public interest by directing that waste to a public entity acting in furtherance of that interest—represent a non-discriminatory exercise of a traditional local police power, and as such do not threaten the core principles of the dormant Commerce Clause. Accordingly, this Court should affirm the Second Circuit's holding that these ordinances are consistent with the federal Constitution.

Amici curiae Onondaga County Resource Recovery Agency ("OCRRA"), Dutchess County Resource Recovery Agency ("DCRRA"), the County of Dutchess, New York, and the New York State Association for Solid Waste Management (the "Association"), have strong interests in that outcome. Both OCRRA and DCRRA were created under the same statutory authority as respondent Oneida-Herkimer Solid Waste Management Authority and are similar to Oneida-Herkimer in their purpose, organiza-

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[1] Pursuant to Supreme Court Rule 37(2)(a), *amici curiae* file this brief in support of respondents with the consent of the parties.

tional structure, and operations. Like respondent, OCRRA and DCRRA have a responsibility to provide the communities they serve with "a solid waste solution that is environmentally sound, highly efficient, safe and innovative, by utilizing the optimal mix of waste reduction, recycling and disposal." Onondaga County Resource Recovery Agency, 2005 Annual Report at 1-2. The Association is a nonprofit association composed of hundreds of members representing local entities that manage waste throughout New York state, including waste management authorities like OCRRA and DCRRA as well as individual counties, towns, and districts.

Like respondents and many other local governmental bodies, moreover, Onondaga and Dutchess Counties have adopted flow-control ordinances that are substantially identical to the one attacked in this litigation.[2] Flow control, by channeling local waste to a designated local facility, permits local communities to generate waste-disposal fees sufficient to subsidize programs—particularly recycling, waste reduction, conversion of waste to energy, and household hazardous waste disposal—that would not otherwise be economically sustainable. If the Court strikes down the Oneida-Herkimer ordinances, the efforts of Onondaga and Dutchess Counties, and others like them, to encourage recycling, reduce waste generation, and practice environmentally sound waste disposal could fall with them, to the immediate and long-term detriment of the health and safety of their citizenry.

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[2] Dutchess County's flow-control ordinance, unlike the Oneida, Herkimer, and Onondaga ordinances, applies by its terms to both local and non-local waste. Dutchess County, however, ceased to enforce its ordinance following this Court's decision in *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), and it does not defend in this proceeding the portion of its ordinance that applies to non-local waste.

STATEMENT

The community ordinances at issue here are the centerpiece of the Counties' comprehensive effort to responsibly manage the disposal of locally generated solid waste. Although local communities have both the right and the obligation to manage their own waste in the public interest, the Counties have chosen to regulate only one element—initial consolidation and cleansing—of a waste management process that starts at curbside and may end at a landfill hundreds of miles away.

The ordinances provide that all waste placed at curbside "shall be delivered" to a facility designated by the county or the Authority. Pet. App. 118a-130a (Oneida County ordinance), 131a-143a (Herkimer County ordinance). The designated facilities in Oneida and Herkimer Counties are owned by respondent Oneida-Herkimer Solid Waste Management Authority, a public entity. J.A. 285a-286a. Private contractors may pick up waste at curbside and deliver it to the transfer facilities; private contractors may pick up waste from the transfer facilities and haul it away. Thus, much of the waste management business in the Counties remains in the hands of private enterprise.

The flow control laws do exactly what their name suggests: they allow the Counties to control the flow of their own solid waste and manage its disposal consistently with the health, safety, and welfare of the public. The basic purpose of flow control is the *cleansing of the waste stream*. The public processing facilities separate the waste into its constituent elements—recyclables, compost, electronic equipment and batteries, household hazardous materials, and so on—to minimize the amount of waste that ends up deposited in landfills, to reduce the quantity of household hazard material in that waste, and to derive such utility from the waste as is possible by recycling, energy generation, and similar processes. The waste that emerges from the flow-control process is cleaner, safer, and less voluminous than the waste that enters it.

Flow control also serves to fund the Counties' basic waste management efforts, which, it bears emphasis, consist of a great deal more than simple waste disposal. The public facilities charge "tipping fees" for waste disposal that help to fund the typically unprofitable activities of recycling, waste reduction, composting, household hazardous waste management, and similar measures that are at the core of the Counties' responsibility for the health and safety of their environments and their people.

Petitioners are commercial waste haulers who would prefer to dump the Counties' waste at commercial out-of-state landfills that are able to offer lower "tipping fees" because they do not fund the recycling, waste reduction, and similar public benefits offered by the Counties. Petitioners argue, in effect, that this Court's decisions construing the "negative" or "dormant" aspect of the federal Commerce Clause elevates the parochial self-interest of a few private trash haulers over local communities' authority, within their police powers, to manage their own solid waste for the public good.

SUMMARY OF ARGUMENT

Petitioners' challenge to the Counties' flow control laws is in effect a challenge to local waste management itself, and to the established constitutional commitment to local authority over community health, safety, and welfare. The principles espoused by petitioners would enlarge the dormant Commerce Clause in a way that would impair state and local efforts at the heart of the police power. Such an enlargement is neither called for nor permitted by this Court's precedents, and should be rejected.

At the heart of this dispute is what petitioners rightly call the "public/private distinction": the notion, adopted by the Court of Appeals, that local regulations favoring a *public* entity merit less onerous Commerce Clause scrutiny than similar regulations favoring *private* enterprise—particularly when the public entity is itself exercising a traditional police power.

I. There is no question that public waste facilities differ significantly from their commercial counterparts. As we will demonstrate, public waste-management facilities exist for different purposes than, and conduct their operations differently from, for-profit private facilities. Indeed, unlike private facilities, public waste management facilities exist as a result of the local governments' police power, and are themselves exercising that same power.

In this context, moreover, flow control ordinances are necessary to control a classic "free rider" problem. Sound waste management constitutes a "public good" in the sense that it produces long-term benefits to the community that far exceed the short-term benefit to any individual. (At a minimum, local governments can rationally believe that to be true.) The creation of such a public good also creates significant costs, however, which individuals have a strong incentive to escape if they can—thereby taking a "free ride" on the costs and investments made by others.

Flow control ordinances like those at issue here help to control free-riding behavior and thereby ensure that everyone in the community pays her fair share. They achieve that result by requiring that all trash be processed at a central, publicly operated facility, where the local government can ensure that every hauler—and by extension all of their customers—both pays the proper fee and disposes of local waste in a safe and environmentally protective way.

II. The pertinent question is therefore whether, in conducting dormant Commerce Clause analysis, the differences between public and private facilities are *constitutionally* relevant. On that fundamental issue, the Second Circuit was correct. Far from being "formalistic" or "superficial," as petitioners dismissively claim, the public/private distinction drawn by the Second Circuit is of clear constitutional importance. Indeed, long-settled principles of constitutional law lead inexorably to the conclu-

sion that where, as here, the regulation at issue is a function of core local police powers, and benefits only a public entity exercising those powers, the public/private distinction is not only legitimate, but constitutionally *required.*

Under settled principles, local laws enacted pursuant to traditional police powers—those relating to the public health, safety, and welfare—receive greater deference than other local regulations. *Cipollene* v. *Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); see also *Bates* v. *Dow Agrosciences*, 544 U.S. 431, 449 (2005); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926). Because the ordinances challenged here address the traditionally local function of waste management, and because they protect the health, safety, and welfare of the local community, they are expressions of the police power, and as such they command constitutional deference unavailable to purely economic or commercial regulation.

That a local regulation is enacted pursuant to the police power does not, of course, remove that regulation from the operation of the Commerce Clause. Our argument is a very limited one. We maintain, simply, that where a local regulation embodies traditional police powers, and that regulation confers an "advantage" *only* upon a public entity acting in furtherance of those powers, that regulation is inherently nondiscriminatory for purposes of dormant Commerce Clause analysis.

Because such a regulation is nondiscriminatory, the appropriate vehicle for determining its validity is the *Pike* balancing test. See *Carbone*, 511 U.S. at 390. In the circumstances presented here—where the District Court made extensive factual findings and concluded that the challenged ordinances imposed no burden on interstate commerce, and where the local benefits conferred by the ordinances are closely related to the health, safety, and welfare concerns that justify their enactment—there is no

basis for invalidating the regulations. The decision of the Court of Appeals should be affirmed under *Pike*.

ARGUMENT

The Commerce Clause and the police power have coexisted since the Founding. The tension between the national aspirations of the one and the local traditions of the other is the tension inherent in dual sovereignty itself. Yet petitioners' position would enlarge the dormant Commerce Clause to unprecedented scope and invasiveness, and would permit federal power to intrude upon what have always been, and should remain, intimately local concerns.

The Constitution requires a more delicate balance. Indeed, the principle announced by this Court decades ago is no less true today:

> This distinction between the power of the State to shelter its *people* from menaces to their health or safety and from fraud, even where those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce *for their economic advantage*, is one deeply rooted in both our history and our law.

H.P. Hood & Sons v. *DuMond*, 336 U.S. 525, 533 (1949) (emphasis added). Where, as here, a local ordinance attempts to benefit, not private economic interests, but a public entity that itself exercises the police power, it poses no threat to the principles underlying the dormant Commerce Clause, and—absent evidence of any burden on interstate commerce—should be upheld.

I. FLOW CONTROL ORDINANCES FALL WELL WITHIN LOCAL GOVERNMENTS' POLICE POWER.

The Constitution allows the States "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Gonzales v. *Oregon*, 126 S. Ct. 904, 923 (2006) (quotations omitted). As shown below, waste management and flow control—like police protection, fire protection, and sanitation—are intimately related to the public health and safety, and thus are within state and local governments' police power.

A. Sound Waste Management Is An Important Health And Safety Issue And Therefore Falls Squarely Within The Police Power Of State And Local Government.

1. For more than a century, this Court has recognized that municipal waste management is a local responsibility within the police power. In *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905), for example, the Court addressed a constitutional challenge to a San Francisco waste-management regulation that forbade any person to "dump . . . within the city and county, any" local waste, requiring instead that such waste be delivered to a designated disposal facility. *Id.* at 308. The Court upheld the ordinance against constitutional challenge as a valid exercise of the city's police powers. Noting that the city enacted the ordinance "to prevent [waste] from being deposited" within the city "to the prejudice of the public health," *id.* at 319, the Court acknowledged the constitutional respect that courts owe to exercises of the police power:

> [I]t is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community."

Ibid. (citations omitted).

The same year, in *Gardner* v. *Michigan*, 199 U.S. 325 (1905), the Court upheld a Detroit regulation requiring local residents to place their garbage in approved sealed containers, to be picked up and disposed of by a designated

vendor. The Court reaffirmed its view that "it was a controlling obligation of the city, which it could not properly ignore, to protect the health of its people in all lawful ways having relation to that object," and that if, in the city's judgment, "the presence of garbage and refuse in the city . . . would endanger the public health by causing the spread of disease, then it could rightfully require such garbage and refuse to be removed and disposed of." *Id.* at 332-33. See also *Hutchinson* v. *City of Valdosta*, 227 U.S. 303, 308 (1913) (noting that "[i]t is the commonest exercise of the police power of a State or city to provide for a system of sewers, and to compel property owners to connect therewith").

In short, it is now firmly established that local waste-management regulations are a proper function of the police power. *See, e.g., North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 315 (1908) (upholding an ordinance authorizing seizure of spoiled and unwholesome foodstuffs); *IESI AR Corp.* v. *Northwest Arkansas Regional Solid Waste Mgmt. Dist.*, 433 F.3d 600, 607 (8th Cir. 2006) (noting that "[e]nsuring adequate waste disposal resources is a valid exercise of the state's police power to protect public health"); *Maharg, Inc.* v. *Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 566 (6th Cir. 2001); *On the Green Apartments, LLC* v. *City of Tacoma*, 241 F.3d 1235, 1238 (9th Cir. 2001); *Southern Disposal, Inc.* v. *Texas Waste Mgmt.*, 161 F.3d 1259, 1264 (10th Cir. 1998); *Massachusetts* v. *Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996); *Harvey & Harvey, Inc.* v. *County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995).

2. Given the settled state of the law on this point, it is surprising that petitioners ignore the police power entirely, and relegate their discussion of both *California Reduction* and *Gardner* to a footnote that dismisses them as irrelevant because "neither of these two cases involved interstate commerce in waste." Pet. Br. 48 n. 16. It is true that neither case invoked the Commerce Clause, but both cases *did* involve "interstate commerce in waste" as peti-

tioners themselves define it.[3] More importantly, petitioners' attempted distinction does not undermine the conclusion in these and other decisions that when local governments manage waste created within their borders, they are acting pursuant to their traditional police powers.

It is also true that the public health and safety interests implicated by waste management have evolved since *California Reduction*. Modern waste management is no longer primarily about *dumping* garbage. And today, the nineteenth-century need for basic disposal services is but one of many waste management considerations in a technologically advanced, highly developed society. Thus, as Congress has recognized, modern waste management programs must satisfy much broader, but no less urgent, needs: the need to engage in "careful planning and management" to mitigate the threat posed by waste to "human health and the environment"; the need to encourage recycling to "reduce the dependence of the United States on foreign resources"; and to develop alternate energy sources for public and private consumption in order to reduce our dependence upon" fossil fuels. 42 U.S.C. § 6901(b) (stating Congressional findings relating to the Resource Conservation and Recovery Act).

To fulfill these missions, respondents—like *amici* OCRRA and DCRRA and many other local waste management agencies around the Nation—offer a comprehensive waste-management program that includes recycling,

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[3] Petitioners claim that "[w]hen in-state generators hire commercial haulers to remove their waste, the waste enters interstate commerce." Pet. Br. 49. As in this case, the waste management systems at issue in both *California Reduction* and *Gardner* relied upon commercial haulers, or at least private parties, to conduct curbside waste removal, and therefore fall well within petitioners' own definition of "interstate commerce in waste." See *California Reduction*, 199 U.S. at 307; *Gardner*, 199 U.S. at 328.

conversion of waste to energy, composting, and household hazardous waste disposal in addition to basic trash disposal. [4] But again, the fact that these services differ from or go beyond the waste management services at issue in *California Reduction* and its progeny does not undermine the conclusion that those services fall well within the traditional police power recognized in those decisions.

B. Flow Control Is Essential To Prevent "Free Riding" In The Recycling, Waste Reduction, And Other Waste-Related Environmental Programs Carried Out By Local Communities Pursuant To Their Police Power.

The many public benefits of a comprehensive waste management program would be difficult or impossible to achieve without flow control. The economics of solid waste, and certain aspects of the financing of waste management, make it very unlikely that unregulated markets will create the "public good" of environmentally responsible waste management. Flow control is the community's legitimate means, acting within its police power, of creating that public good and preventing individual consumers and waste haulers from free-riding on the community's efforts.

Petitioners' position, by contrast, amounts to little more than a claim that the Commerce Clause grants them and their customers a constitutional license to avoid paying their fair share of the cost of a basic public service—a claim that, if extended to other traditional local services, would eviscerate local government.

1. All the services provided by public waste authorities like OCRRA, DCRRA, and the respondent authority—

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[4] There is some variation in the services offered by different waste management authorities. DCRRA, for example, does not offer composting; respondents no longer offer waste-to-energy conversion.

except, in some cases, basic trash disposal—are unprofitable. The cleansing of the waste stream that is a primary function of sound municipal waste management is expensive and burdensome. The most environmentally critical waste services—like recycling, composting, and household hazardous waste disposal—are typically provided free of charge or at a nominal fee, to encourage maximal use by citizens. Individual consumers, left to their own devices, are very unlikely to pay extra for these services, even though consumers in the aggregate—which is to say, the public—benefit enormously from them. See New Hampshire Dep't of Environmental Services, "The Cost of Flow Control": Critical Review of the National Economic Research Associates Analysis (May 1995) Commissioned By Browning-Ferris Industries, p.1 (November 27, 1995) ("New Hampshire Flow Control Report"). In an unregulated market there would likely be no recycling, no waste-reduction programs, no waste-to-energy conversion, and no household hazardous waste disposal—and certainly no systematic program implementing all these services.

These efforts thus exemplify a classic "public good" problem well recognized in economics. *See, e.g.*, Paul A. Samuelson and William D. Norhaus, *Economics* at 370 (18th ed. 2005). They bring significant long-term benefits to the entire community, while (in the considered judgment of many local governments) their absence would cause the community to bear significant long-term costs and risks. *Ibid.* Such efforts, therefore, create a "public good"—something that is of greater value to the entire community over the long term than it is to each community member in the short run. *Ibid.* (defining "public good" as a good "whose benefits are indivisibly spread among the entire community, whether or not individuals desire to purchase the public good").

2. The flow-control regulations at issue here represent the community's attempt to solve this fundamental problem. By requiring all local waste—and only local waste—to be delivered to a designated public transfer facility, the

regulations permit the county to charge "tipping" fees sufficient to finance *both* basic waste disposal services *and* the recycling, waste reduction, composting, and similar programs necessary to meet the local community's waste management needs. See OCRRA 2005 Annual Report at 4.

To be sure, flow control is just one element—albeit an important one—in what is accurately characterized as a broad public-private partnership in local waste management. As both respondents and other *amici* have pointed out, the Counties could, acting within their police power, choose to displace private enterprise throughout the waste management process. Instead, they have pursued a more modest approach, regulating only where necessary and leaving the great majority of the business of waste management to the private sector.

Flow control, moreover, is the *only* regulatory solution that permits communities simultaneously to achieve both goals of public waste management: assurance that local waste will be disposed of responsibly, and funding for disposal alternatives like recycling, composting, and household hazardous waste removal. Taxation could provide funding for responsible waste management, but would do nothing to ensure that local waste is in fact managed responsibly. Substantive regulations could seek to ensure responsible conduct by citizens and private waste haulers, but would provide no funding for unprofitable—but publicly b[illegible]cial—programs. Flow control, by contrast, achieve[illegible] these interests efficiently and effectively.

3. This effort to finance the provision of this public good by relying largely upon the private sector, however, creates a closely related problem that is equally well-recognized in economics: the "free rider" problem. That problem arises because any private actor has a strong incentive to escape, if possible, the costs that others pay to finance the public good. See, *e.g.*, Joseph Stiglitz, *Public Sector Economics* at 131 (3d. ed. 2000). That is why flow

control is so important in this context: it prevents some customers—mainly large producers and haulers of waste—from "free riding" on the costs paid by the rest of the community to enjoy the environmental benefits of recycling, conservation, and safe disposal of household hazardous waste.

This point is confirmed by petitioners' own acknowledgment that "if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities" at significantly lower prices than the counties charge (Pet. Br. 5). Assuming this is true, it does not offer a meaningful comparison, because the lower prices charged by those unnamed "out-of-state facilities" reflect no expenses save those of basic trash disposal. See New Hampshire Flow Control Report at 1. The higher fees charged by Oneida-Herkimer's transfer facilities, like OCRRA's, incorporate the costs of the full range of modern waste-management services—services that the people of Oneida, Herkimer, and Onondaga Counties have concluded are in the public interest.

Like any business seeking to maximize profits, the haulers—and by extension their customers—would prefer not to pay for those services. They would prefer to be "free riders." They are situated no differently, however, from another citizen who wishes not to pay permit or license fees that finance important functions of local government; or yet another citizen who would prefer not to subsidize the maintenance of a local police force, or fire department, or sewer authority. That private services might be available to serve a particular need at lower cost does not create a constitutional right to use those services in violation of local law—at least where, as here, the local law is a proper expression of valid police powers.

Indeed, the haulers or their customers could presumably dispose of their waste in a variety of ways that would achieve substantial savings, if Oneida and Herkimer Counties decided to look the other way. But the Counties

have an affirmative obligation to manage their own waste, see *Gardner*, 199 U.S. at 332, and they have chosen to do so, not by dumping trash at the cheapest possible price, but by creating an integrated system of waste management that serves a wide array of valid, waste-related goals. As shown below, nothing in this Court's jurisprudence requires, or even permits, the application of the dormant Commerce Clause to run roughshod over local police power in the manner that petitioners suggest.

II. WHERE A COMMUNITY, ACTING WITHIN ITS POLICE POWER, ENACTS A LAW DIRECTING LOCAL TRASH TO A COMMUNITY-OPERATED FACILITY THAT ITSELF EXERCISES THE POLICE POWER, SUCH A LAW DOES NOT VIOLATE THE COMMERCE CLAUSE.

This Court's decisions recognize that the Commerce Clause exists to facilitate the existence of a national common market in goods and services. To that end, it has been held to prohibit both local laws that "discriminate" against interstate commerce and otherwise neutral laws that impose "excessive burdens" on that commerce. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 287 (1997). As we will explain, however, the laws at issue here—which regulate a core police-power activity and favor only a public entity that is itself acting in furtherance of that police-power activity— are not "discriminatory" for purposes of the dormant Commerce Clause. And because the laws are not discriminatory, they must be upheld inasmuch as there is no evidence that the ordinances impose *any* genuine burden on interstate commerce.

A. Because Such A Law Benefits Only A Public Entity Carrying Out A Core Police Power Function And Regulates Only Local Waste, It Does Not "Discriminate" Against Interstate Commerce.

This Court has held that even a necessary local police power regulation may violate the dormant Commerce

Clause if it "discriminates" against interstate commerce. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). It is clear, for example, that a local regulation requiring *all* waste entering the county—including out-of-state waste—to be plucked from the stream of commerce and deposited in a local facility would discriminate against interstate commerce and be subject to strict scrutiny. See *Carbone*, 511 U.S. at 390. Similarly, a local regulation requiring haulers to deposit waste at a designated local commercial facility would also face strict scrutiny if the commercial facility were favored solely because of its local provenance. See *ibid.* The mere presence of a police power interest, in other words, does not trump the dormant Commerce Clause's core prohibition against laws that discriminate against interstate commerce.

A recognition that the police power does not automatically vitiate the Commerce Clause's proscription against "discrimination" does not, however, answer the question posed here: whether a regulation favoring a public entity, rather than a commercial one, is "discriminatory" for purposes of Commerce Clause analysis. This Court's decisions strongly indicate that it is not, and that local laws that benefit public entities, rather than conferring commercial advantage on private entities, should receive the less onerous scrutiny applied to non-discriminatory laws under the *Pike* balancing test.

1. Because of the government's police power, there is a constitutionally significant difference between a law that favors a local government and one that favors local private enterprise.

The core prohibition of the dormant Commerce Clause doctrine is discrimination against commerce: the doctrine "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys, Inc.* v. *Dep't of Environmental Quality of Oregon*, 511 U.S. 93, 98 (1994). "Discrimina-

tion," by definition, involves "differential treatment" of "substantially similar entities." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 298-99 (1997). State restrictions on commerce that discriminate between similarly situated entities are "virtually per se invalid." *Oregon Waste Sys.*, 511 U.S. at 99.

This Court, however, has consistently construed "discrimination," for Commerce Clause purposes, to encompass "differential treatment of in-state and out-of-state *economic interests* that benefits the former and burdens the latter." *Id.* at 99; see also *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 273-74 (1988). The term "economic interests," in turn, has been construed to mean *private* economic interests, that is, commercial interests. *See, e.g., Carbone*, 511 U.S. at 392 (noting that "[d]iscrimination against interstate commerce *in favor of local business or investment* is [virtually] per se invalid") (emphasis added); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) (striking down statute because it protected "local waste producers . . . from competition from out-of-state waste producers"); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951) (striking down statute as discriminatory because it "protect[ed] a major local industry against competition from without the State").

The heart of petitioners' argument is that the public/private distinction consistently, if implicitly, drawn by this Court and relied upon by the Second Circuit lacks constitutional justification—that Commerce Clause discrimination analysis admits of no distinction between private business and public enterprise. Put another way, petitioners claim that the *public* waste authority "favored" by the Oneida-Herkimer ordinances is "similarly situated" to out-of-state *commercial* waste processing facilities for purposes of Commerce Clause differential-treatment analysis. See *General Motors Corp.*, 519 U.S. at 298-99.

Petitioners are mistaken. As demonstrated in detail above, public waste management authorities and private waste processors are not "similarly situated" for a host of factual reasons—most notably, because both their purposes and their operations differ significantly from those of their commercial counterparts, and because governmental entities, unlike private ones, have a legitimate role in mitigating "public good" and "free-rider" problems.

More important, however, and in part for these reasons, the Authority and its alleged private competitors are not "similarly situated" as a matter of constitutional law. See *id.* (noting that "the threshold question" in dormant Commerce Clause analysis is "whether the companies are similarly situated *for constitutional purposes*") (emphasis added). A public waste authority, like a fire department or police department, is an agent of local government, which in turn is an agent of the people as a whole. *See, e.g.*, Locke, *Second Treatise on Government* s. 240 (1690) (describing government as the "trustee" or "deputy" of the people); *The Federalist* No. 46 (James Madison) (Clinton Rossiter ed. 1961) (describing state governments as "agents and trustees of the people"). Moreover, as explained above, public waste management authorities exercise a portion of the police power that the people have delegated to their government—a power that the Tenth Amendment recognizes as being "reserved . . . to the people." U.S. Const. Amend. X. For both of these reasons, public waste management agencies and facilities enjoy a constitutional status fundamentally different from that of an individual or private company. To treat such authorities as if they were no different from commercial businesses would be to ignore the constitutional commitment to local sovereignty and reserved powers, and would skew the constitutional balance heavily against local government.

This Court has recognized the constitutional importance of the police power in the dormant Commerce Clause context as recently as last term. In *American Trucking*

Association v. *Michigan Public Service Commission*, 545 U.S. 429 (2005), the Court upheld against dormant Commerce Clause challenge a Michigan law imposing an annual fee on intrastate trucking. In upholding the regulation, the Court explained that the law did not violate the dormant Commerce Clause because it was merely "an unobjectionable exercise of the State's police power." *Id.* at 434.

The constitutional significance of the police power is also well established in the Court's active Commerce Clause and preemption jurisprudence, in which it is well established that "the historic police powers of the states [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollene,*, 505 U.S. at 516; see also *Bates*, 544 U.S. at 449; *Rice*, 331 U.S. at 230; *Napier*, 272 U.S. at 611. These decisions demonstrate that, even where Congress has affirmatively legislated on a subject within the scope of traditional state police powers, those powers command constitutional respect, and may be superseded only in narrow circumstances. It would be strange indeed if traditional police powers received *less* constitutional deference where Congress has made *no* effort to preempt state authority—and in fact has indicated its strong support for local control of waste management. See 42 U.S.C. § 6901(a)(4) (stating Congressional finding that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies").

In this regard, it bears emphasis that actions taken pursuant to police powers are *not* automatically beyond Commerce Clause scrutiny. Rather, when a community takes local action within the scope of its traditional police powers, and that action confers no differential benefit except upon a public entity acting in furtherance of those powers, Commerce Clause scrutiny must account for the independent constitutional value of local authority. Put another way, police power regulations that do not benefit

local commercial interests are not "discriminatory" in any constitutionally relevant way.

Consideration of other police power regulations confirms the principle that when such regulations confer only public benefits, rather than commercial advantage, they are not "discriminatory" as a matter of law. Consider, for example, a local law requiring that wild animals wandering within city limits be captured by the municipal animal-control department. Such a law theoretically disadvantages out-of-state wranglers who might otherwise compete for local business. But it would be strange to describe the law as "discriminatory" in any meaningful way. The same is true for any traditional community service: the maintenance of a local police force, for example, displaces private security companies; municipal water and sewer authorities displace commercial providers of sanitation services. Nevertheless, the authority of our cities and towns to provide their citizens with police protection and basic sanitation, rather than "outsourcing" those functions to private companies, has never been subjected to strict scrutiny under the dormant Commerce Clause.

For all these reasons, affirming the public/private distinction employed by the court below will do no more—and no less—than confirm what we have always known: that states and localities can police their streets, regulate fire hazards, provide sewage and sanitation, and conduct trash management in the public interest without running afoul of the Constitution, so long as they do so without impermissibly favoring local private interests at the expense of out-of-state commercial interests.

2. Because the challenged laws regulate only local waste, they operate at the heart of the Counties' police power jurisdiction, and are distinguishable from the much broader regulation struck down in *Carbone*.

The principles we advocate here are also consistent with this Court's decision in *Carbone*. Although the regu-

lation struck down in *Carbone*, like the one at issue here, was enacted pursuant to the town's police powers, it differed in two crucial respects: first, as discussed, the *Carbone* regulation favored a private commercial entity, rather than a public noncommercial one; and second, the *Carbone* regulation applied to "all nonhazardous solid waste within the town," including "waste generated outside [the town] and brought in." *Carbone*, 511 U.S. at 387. In other words, the regulation operated to "capture" waste generated elsewhere—including in other states—and remove it from the stream of commerce. The majority opinion noted that feature of the ordinance no fewer than five times.[5] In fact, the very waste that prompted the original lawsuit in *Carbone*—seven tractor-trailers of nonrecyclable waste from Carbone's facility that were stopped by local police on their way out of town—contained waste "originating both within and without the town" that was "destined for disposal sites in Illinois, Indiana, West Virginia, and Florida." *Id.* at 388.

When a regulation creates the specter of the local sheriff intercepting out-of-state trucks laden with foreign goods, plucking them from the stream of commerce and directing them forcibly to the local processing facility, it seems beyond dispute that the regulation poses precisely the kind of economic barrier to interstate commerce that is likely to incite the "regional jealousies" that the Founders enacted the Commerce Clause to proscribe. *See, e.g.*, *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (noting that "a chief occasion of the commerce clauses was the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation"). In light of its application—theoretical and actual—to interstate waste, the regulation in *Carbone* discriminated against interstate commerce in a way that the Oneida-Herkimer regulations do not.

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[5] See *id.* at 387, 388, 389, and 390.

Specifically, those ordinances regulate only the disposal of waste that is generated by the local community. See Section 2(c) of Herkimer County Local Law, Introductory No. 1—1990 (limiting application of the ordinance to materials placed at the roadside for collection). For that reason, they operate at the core of the counties' police power authority—and obligation—to manage their own waste. Locally produced waste is squarely within the "jurisdictional bounds" of the counties' police power, in a way that foreign waste is not. *Carbone*, 511 U.S. at 393.

3. Upholding the challenged ordinances on police-power grounds is entirely consistent with this Court's "local processing" cases.

The presence of a strong police power rationale for the laws challenged here also distinguishes the present case from the many "local processing" cases relied on by petitioners. Pet. Br. 27-33. Those cases all involve quintessentially protectionist economic legislation enacted outside the scope of traditional police powers. None of the goods involved in those cases—including shrimp (*Toomer* v. *Witsell*, 334 U.S. 385 (1948)), timber (*South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984)), cement (*Reeve, Inc.* v. *Stake*, 447 U.S. 429 (1980)), and oysters (*Johnson* v. *Haydel*, 278 U.S. 16 (1928))—is a traditional responsibility of local government or a matter of community health, safety, and welfare.[6] The "local processing" cases therefore simply do not present the central issue confronting the Court in this case: how to reconcile the dormant Commerce Clause with the independent constitutional commitment to strong local police powers. Instead, these

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[6] Another processing case, *Minnesota* v. *Barber*, involved meat inspections—arguably a police power activity—but, as in *Carbone*, the challenged regulation applied to both domestic and out-of-state meats, and so extended beyond the state's police power jurisdiction. 136 U.S. 313 (1890).

cases involved what were essentially economic regulations intended to protect local commerce—precisely the kind of discriminatory regulations that this Court has held require strict Commerce Clause scrutiny—and are readily distinguishable from the waste-management regulations at issue here.

To be sure, both waste and the process of its disposal are "commerce" for constitutional purposes. See *Fort Gratiot Sanitary Landfill*, 504 U.S. at 359 (recognizing that waste is an article of commerce) and *Carbone*, 511 U.S. at 391 (noting that "the service of processing and disposing" of waste is commerce). To show that local waste and its disposal involve commerce, however, is not to establish that local waste and its disposal involve *merely* commerce, and are imbued with no special constitutional significance. The role of the police power in waste management, and its status as a traditionally local function, make it different in kind from merely economic activities, and call for different and more deferential constitutional analysis.

Neither *Carbone* nor the Court's other "local processing" cases, therefore, conflicts with the narrow principle we urge here: that where a local regulation embodies traditional police powers, and that regulation confers an "advantage" *only* upon a public entity acting in furtherance of those powers, that regulation does not discriminate against interstate commerce.

B. Such A Law Does Not Pose An Undue Burden On Interstate Commerce Under The *Pike* Balancing Approach.

Because the ordinances at issue here do not discriminate against interstate commerce, the appropriate mechanism for evaluating their validity is the balancing test in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). *Carbone*, 511 U.S. at 390.

The *Pike* test asks "whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" *Ibid.* (quoting *Pike*, 397 U.S. at 142). Because there is no evidence that the ordinances at issue impose any burden on interstate commerce, and because the benefits they confer on Oneida and Herkimer Counties are real and significant, the ordinances do not excessively burden commerce.

1. The District Court found as fact that the challenged ordinances imposed no burden on interstate commerce, and petitioners offer no basis for overturning that conclusion.

The District Court found as fact that the challenged ordinances impose no cognizable burden on interstate commerce. Pet. App. 74a. And before this Court, petitioners identify no evidence sufficient to bear their burden of contradicting the District Court's conclusion.

In lieu of factual evidence of any kind, they offer a series of *ipse dixit* statements suggesting, without evidentiary support, that the ordinances "impose[ ] a severe burden on interstate commerce that cannot be justified by the local interests at issue here." Pet. Br. 41. But petitioners never identify what the alleged "burden" on interstate commerce actually is. They identify no commercial markets that are harmed, and make no effort to quantify any such (unalleged) harms. To be sure, in the proceedings below they alleged a potential diminution in the general commerce of solid waste. But they do not repeat that assertion before this Court, and it is not clear that petitioners have *any* factual basis, of record or otherwise, for their repeated assertions that the burden on commerce imposed by these ordinances is "severe."

Even if petitioners offered any plausible argument suggesting that the District Court's findings were erroneous, this Court would be a poor venue in which to resolve a factual dispute: because this Court is "[a] court of law . . . rather than a court for correction of errors in fact finding,"

it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); see also *Southern Pac. Co.* v. *Arizona ex rel Sullivan*, 325 U.S. 761, 771 (1945) (declining to overturn state court factual findings where those findings, "although challenged in some particulars," were "supported by evidence").

In any event, faced with a factual record that is overwhelmingly against them, petitioners attempt to recast the question of the ordinances' burden on commerce as a question of law. Their *Pike* arguments rely almost entirely on a misreading of Justice O'Connor's concurring opinion in *Carbone*, in which she concluded that the ordinance challenged there was nondiscriminatory but failed the *Pike* test. See *Carbone*, 511 U.S. at 401 (O'Connor, J., concurring).

Petitioners' reliance on *Carbone* (and on an analysis joined by no other Justice) is misplaced. *Carbone* came before this Court on summary judgment. See *id.* at 388. The Court therefore lacked any factual information on which to base a conclusion of "excessive burden," and, indeed, it drew no such conclusion. Because the Court concluded that the *Carbone* ordinance was discriminatory, it did not consider whether it also posed an "excessive burden" on interstate commerce, and we cannot know how the Court would have resolved that issue—or if it would have chosen to resolve the issue at all in the absence of a factual record.

In addition, petitioners' characterization of Justice O'Connor's concurrence ignores the rationale for her conclusion that the Clarkstown ordinance failed *Pike* balancing. In reaching that conclusion, the concurrence focuses almost entirely on the extraterritoriality feature of the Clarkstown regulation, which forced even out-of-state waste to be brought to the facility of the favored local business. See *Carbone*, 511 U.S. at 406-07 (O'Connor, J.,

concurring) (discussing the specter of inconsistent local regulations governing the same waste).

We respectfully suggest that the one-Justice concurrence in *Carbone*, drawing its conclusions entirely from the briefs and without the benefit of any fact-finding, is too slender a reed on which to base a constitutional decision of the magnitude presented here, and that in any event the concurrence's reasoning is inapplicable on the facts of this case. Because petitioners have identified no other basis for their assertion that the ordinances impose a "severe" burden on interstate commerce, petitioners have presented no adequate basis for overturning the findings of the magistrate, District Court, and Court of Appeals.

2. Even if the issue of "excessive burden" is a question of law, petitioners' *Pike* analysis fails to conduct any meaningful balancing of burdens and benefits.

Even if petitioners' reliance on the *Carbone* concurrence were appropriate, their *Pike* balancing argument would fail on its own terms. *Pike* balancing "involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 441 (1978). Petitioners' *Pike* analysis neglects to determine either the "extent" of the burden allegedly imposed by the ordinances or the "weight and nature" of the Counties' regulatory concern. See *ibid.* Instead, they simply lift the *Carbone* concurrence's *Pike* analysis and graft it, wholesale, onto this very different case.

Concluding without analysis that the burdens imposed by the ordinances are "severe" and "extreme," petitioners simply dismiss out of hand the offsetting benefits substantiated by the District Court—including the management of environmental liability issues and the financing of recycling efforts—calling them "spurious." Pet. Br. 43. In fact,

petitioners' discussion of the "putative local benefits" prong of the *Pike* test relies, not on authorities applying the *Pike* test, but on rulings and standards from *Carbone* and other cases in which the regulations were found to be discriminatory. Compare Pet. Br. 46 (asserting that the challenged ordinances fail *Pike* balancing by reference to pages 17-19 of the brief) with *id.* at 17-19 (discussing why the putative benefits of the *discriminatory* ordinance in *Carbone* were inadequate to survive *strict scrutiny*).

In short, petitioners' analysis turns *Pike* on its head and essentially makes *Pike* analysis an exercise in strict scrutiny. This ploy cannot, however, obscure the fact that local benefits that are inadequate to survive strict scrutiny may well be adequate to survive the lesser scrutiny afforded by *Pike* balancing. And petitioners fail to cite a single authority (other than the *Carbone* concurrence) for their assertion that the local benefits conferred by the Oneida-Herkimer ordinances are insufficient to survive *Pike* balancing. They therefore have offered no basis on which to overturn the Court of Appeals' decision.

3. Because the principal purpose of the flow-control laws here is the support of community health, safety, and welfare programs, the benefits they confer are more compelling than those in *Carbone*.

Moreover, there is no question that flow-control confers enormous benefits on the people of Oneida and Herkimer Counties.[7] As discussed in detail above, the ordinances

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[7] Petitioners' assertion that the benefits are "minimal" is unsupported by their own brief, which discusses not whether the ordinances provide benefits, but only whether those benefits could be achieved in some other way—an inquiry that is relevant only to strict scrutiny, not *Pike* balancing. *See, e.g.*, Pet. Br. 46 (describing benefits as "minimal" and referring to pages 17-19) and 17-19 (discussing ordinances' benefits in terms of strict scrutiny).

enable the Counties to prevent "free riding" and thereby provide recycling, waste reduction, and similar programs that are not independently financially viable. By contrast, the *only* purpose of the flow-control regulation struck down in *Carbone* was to finance the construction of the private waste facility. *Carbone*, 511 U.S. at 393. This distinction is critical to appropriate *Pike* balancing.

1. First, it is important to remember that the Court in *Carbone* never addressed whether the avowed purpose of Clarkstown's flow-control ordinance was sufficient to outweigh the burdens imposed on interstate commerce. The *Carbone* Court concluded that the ordinance was discriminatory, and that the purpose was inadequate to survive the strict scrutiny given to discriminatory regulations. Only one Justice, writing only for herself, reached the *Pike* balancing issue. *Carbone* therefore provides no guidance on how the majority would have analyzed the facility financing purpose at issue in that case under *Pike* balancing.

Even if the *Carbone* concurrence provided useful guidance for *Pike* balancing in dormant Commerce Clause cases, it would have very limited value here, because respondents have offered different, and much more compelling, justifications for the challenged ordinances. The flow-control ordinance in *Carbone* was enacted simply to pay for the construction of the facility and ensure its profitability. There was no necessary relationship between the ordinance, its purpose, and the authority under which it was enacted. In other words, there is nothing about the construction of buildings that relates to the health, safety, and welfare of the community.

The ordinances at issue here, by contrast, represent the exercise of the police power for the furtherance of quintessentially public benefits. Moreover, the congruence of the ordinances' purposes and the police power authority invoked to enact them makes their benefits much more compelling, for dormant Commerce Clause purposes, than

the benefit conferred in *Carbone*. Because Commerce Clause analysis must acknowledge the existence of the countervailing constitutional value represented by the police power, it stands to reason that the more closely the "relative benefits" of a police power regulation adhere to core police power subjects, the more respect those benefits should receive in the constitutional balancing required by *Pike*.

As we have shown, petitioners have provided no evidentiary or theoretical basis for overturning the *Pike* balancing undertaken by the Court of Appeals and the District Court. That fact is sufficient to affirm the decision of the Second Circuit.

2. Even if petitioners had made a serious attempt at *Pike* balancing, they have failed to demonstrate that the burdens imposed by the ordinances on interstate commerce were "excessive" in relation to their benefits. To the contrary, basic constitutional principles suggest that where a flow control law reasonably furthers an exercise of the government's police power, and does not disadvantage out-of-state businesses, the law will rarely, if ever, be invalid under *Pike* analysis. Although the burdens imposed on interstate commerce by a law reasonably related to a traditional police power will vary from case to case, the "relative local benefits" of such a law should *always* be considered substantial out of respect for the constitutional role of the states and settled understandings of the constitutional status of the police power.

The role of the police power, in other words, is to create a *de facto* presumption of validity in the face of a dormant Commerce Clause challenge. Such a presumption already operates in the realm of the Court's preemption jurisprudence, see *Cipollene*, 505 U.S. at 516, and it would be entirely consistent with established constitutional principles to employ a similar presumption in the context of the dormant Commerce Clause. But the Court need not go so

far, given that petitioners have failed to provide any basis for questioning the Court of Appeals' *Pike* analysis.

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This Court has long recognized that in "cases in which regulation of local matters may also operate as a regulation of commerce," it is necessary to perform a "reconciliation of the conflicting claims of state and national power." *Southern Pac. Co.*, 325 U.S. at 768-69. The precise way in which those claims are reconciled at the margins remains the subject of an enduring constitutional debate. The very nature of the inquiry, however, suggests an operative principle: where the legitimate claims of one sovereign are at their zenith, and the claims of the other at their nadir, the stronger claim must prevail. Accordingly, as the Second Circuit recognized, the proper "reconciliation" in this case is to uphold the local waste management ordinance.

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted.

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